

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 32805

STATE OF IDAHO,	)	2007 Opinion No. 80
	)	
Plaintiff-Respondent,	)	Filed: December 4, 2007
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
MARVIN SHANE BISHOP,	)	
	)	
Defendant-Appellant.	)	
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. R. Barry Wood, District Judge.

Judgment of conviction for possession of a controlled substance and resisting and obstructing an officer, vacated and case remanded.

Molly J. Huskey, State Appellate Public Defender; Shannon N. Romero, Deputy Appellate Public Defender, Boise, for appellant. Shannon N. Romero argued.

Hon. Lawrence G. Wasden, Attorney General; Thomas Tharp, Deputy Attorney General, Boise, for respondent. Thomas Tharp argued.

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GUTIERREZ, Judge

Marvin Shane Bishop appeals from his judgment of conviction for possession of a controlled substance and resisting and obstructing an officer. Specifically, Bishop challenges the denial of his motion to suppress. Because we conclude that Bishop's motion to suppress should have been granted, we vacate Bishop's judgment of conviction and remand.

I.

BACKGROUND

On May 25, 2005, two carnival workers contacted Casey Kelly, the Hagerman City Superintendent, and reported that a man, later identified as Bishop, had just offered to sell them methamphetamine. The carnival workers were in Hagerman for the Fossil Days celebration which was taking place that weekend. The two men asked Kelly to contact the police for them, which he did. Kelly called Chief Loren Miller of the Hagerman police department, who was on

duty that evening. Kelly reported the direction Bishop was heading, what street he was on, and gave a description of him. While Chief Miller was en route to talk to Bishop, Kelly again called him and reported that he had followed Bishop until Bishop entered a market. Chief Miller was still on the phone with Kelly when he arrived at the market and observed Bishop exiting the store. Kelly identified Bishop as the man he had called Chief Miller about earlier. Chief Miller then followed Bishop into an alley behind the store, identified himself as a police officer, and told Bishop he needed to speak with him. Bishop said, "Hello" to Chief Miller but did not stop walking. Chief Miller got out of his marked police car and again stated that he needed to speak with him. Bishop asked what Chief Miller needed to speak with him about, and Chief Miller responded that it was about methamphetamine. At this point Bishop stopped walking and told Chief Miller that "he was a Christian and that Jesus loved [Chief Miller] too." Bishop's eyes were blood-shot and he was nervous and fidgety. According to Chief Miller he had a "wild look" in his eyes. Bishop was clutching a plastic grocery bag to his chest with both hands. Chief Miller could tell that Bishop did not want to be there speaking with him. Chief Miller informed Bishop that he was going to conduct a pat-down search for weapons, for the safety of both of them. Bishop refused to submit to the search, repeatedly telling Chief Miller, "No." Chief Miller told Bishop to follow his instructions or he would be placed under arrest. Bishop said, "Okay" and put his hands on the trunk of the police car. Shortly after Chief Miller began the pat-down search, Bishop turned around to face him and again said, "No." A struggle ensued while Chief Miller attempted to handcuff Bishop. Chief Miller placed Bishop on the ground, and Bishop tucked his hands and knees in to his chest in the fetal position to avoid being handcuffed. Another officer arrived on the scene and assisted Chief Miller in handcuffing Bishop.

A cursory pat-down search was conducted after Bishop was arrested, revealing a baggie of methamphetamine in his pocket. Bishop was transported to the carnival area where the two carnival workers identified him as the man who offered to sell them methamphetamine. Bishop was initially charged with two counts of possession of a controlled substance for methamphetamine and marijuana, possession of drug paraphernalia, and resisting an officer. After his motion to suppress was denied, Bishop entered a conditional guilty plea to possession of a controlled substance, methamphetamine, I.C. § 37-2732(c)(1), and resisting and obstructing an officer, I.C. § 18-705. The other two charges were dismissed. This appeal followed.

## II. STANDARD OF REVIEW

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact which are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

## III. DISCUSSION

Bishop raises two theories as to why the evidence seized from him should have been suppressed. First, he claims Chief Miller lacked reasonable suspicion to stop him based on the uncorroborated tip received through Kelly. Second, Bishop asserts that Chief Miller could not justify a pat-down frisk with specific and articulable facts that Bishop was armed and dangerous, and thus he was unlawfully searched during the course of an already unlawful seizure. The state counters that Kelly was a known citizen informant and therefore inherently reliable, giving rise to reasonable suspicion to stop Bishop. The state further argues that, even if the initial frisk was unlawful, the drugs were discovered pursuant to a search after Bishop was arrested for resisting and obstructing Chief Miller; therefore they were admissible because Bishop's resistance terminated the frisk and led to a lawful arrest.<sup>1</sup>

The Fourth Amendment to the United States Constitution, and its counterpart, Article I, section 17 of the Idaho Constitution, guarantee the right of every citizen to be free from unreasonable searches and seizures. A warrantless search or seizure is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement.

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<sup>1</sup> The state urges us to hold that Bishop's resistance to Chief Miller's order to submit to a protective frisk created probable cause for a warrantless arrest, and therefore the discovery of methamphetamine was pursuant to a lawful search. The state claims that Bishop's resistance purged any taint associated with the initial frisk such that the subsequent search incident to arrest was valid. This Court's conclusion that the initial frisk was unlawful is dispositive of this case and we therefore decline to address whether Bishop could refuse to comply with the frisk.

*Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Zapata-Reyes*, Docket No. 32908 (Ct. App. Sept. 26, 2007); *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999). In *Terry v. Ohio*, 392 U.S. 1 (1968), the United States Supreme Court created a stop-and-frisk exception to the Fourth Amendment warrant requirement. The stop and the frisk constitute two independent actions, each requiring a distinct and separate justification. *State v. Holler*, 136 Idaho 287, 291, 32 P.3d 679, 683 (Ct. App. 2001). The stop is justified if it is based upon specific articulable facts which justify suspicion that the detained person is, has been, or is about to be engaged in criminal activity. *State v. Sheldon*, 139 Idaho 980, 983, 88 P.3d 1220, 1223 (Ct. App. 2003); *Holler*, 136 Idaho at 291, 32 P.3d at 683. The lawfulness of a frisk is to be determined by the court, based upon an objective assessment of the circumstances that confronted the officer at the time of the frisk as to whether the individual may be armed and dangerous. *Holler*, 136 Idaho at 291, 32 P.3d at 683; *State v. Babb*, 133 Idaho 890, 892, 994 P.2d 633, 635 (Ct. App. 2000).

**A. Reasonable Suspicion Existed to Stop Bishop for Investigative Purposes**

Although not all encounters between the police and citizens involve the seizure of a person, *Terry*, 392 U.S. at 19 n.16; *State v. Jordan*, 122 Idaho 771, 772, 839 P.2d 38, 39 (Ct. App. 1992), a person who is detained by an officer for investigatory purposes has been seized, *Terry*, 392 U.S. at 22, *State v. Rawlings*, 121 Idaho 930, 932, 829 P.2d 520, 522 (1992). Whether an officer had the requisite reasonable suspicion to conduct an investigatory seizure is determined on the basis of the totality of the circumstances. *Rawlings*, 121 Idaho at 932, 829 P.2d at 522. “Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability.” *Alabama v. White*, 496 U.S. 325, 330 (1990).

Bishop contends that Chief Miller could not have formed a reasonable suspicion that Bishop had engaged in criminal activity because two unnamed carnival workers told Kelly that a man tried to sell them methamphetamine. Kelly in turn relayed that information to Chief Miller who did not interview the carnival workers or conduct any independent investigation prior to stopping Bishop. It is well established that a police officer can form a reasonable suspicion to conduct a *Terry* stop for investigative purposes based on information provided to him by other individuals. See *Illinois v. Gates*, 462 U.S. 213 (1983); *White*, 496 U.S. 325; *United States v. Merritt*, 695 F.2d 1263 (10th Cir. 1982); *State v. Hankey*, 134 Idaho 844, 11 P.3d 40 (2000);

*State v. Larson*, 135 Idaho 99, 15 P.3d 334 (Ct. App. 2000). Whether information from a tip is sufficient to create reasonable suspicion depends upon the content and reliability of the information presented by the source, including whether the informant reveals his identity and the basis of his knowledge. *State v. Alexander*, 138 Idaho 18, 23, 56 P.3d 780, 785 (Ct. App. 2002); *Larson*, 135 Idaho at 101, 15 P.3d at 336. An anonymous tip, standing alone, is generally not sufficient to justify a stop because an anonymous tip seldom demonstrates the informant's basis of knowledge or veracity. *Larson*, 135 Idaho at 101, 15 P.3d at 336. However, when the information from an anonymous tip bears sufficient indicia of reliability or is corroborated by independent police observations, it may provide justification for a stop. *Id.* Where the information comes from a known citizen informant rather than an anonymous tipster, the citizen's disclosure of his identity, which carries the risk of accountability if the allegations turn out to be fabricated, is generally deemed adequate to show veracity and reliability. *Id.*; *see also Gates*, 462 U.S. at 233; *Alexander*, 138 Idaho at 24, 56 P.3d at 786.

The state claims that Kelly was a known citizen informant, and therefore his veracity was not to be doubted. However, Kelly's knowledge of the events comes exclusively from the two carnival workers. Kelly did not possess any first-hand information about what transpired; he was merely a conduit through which the information was passed. While Kelly's second-hand information does not show the reliability or veracity of the informants, the two carnival workers with first-hand information were not anonymous tipsters. A known citizen is one who provides facts from which his or her identity can be readily ascertained. *State v. Van Dorne*, 139 Idaho 961, 965, 88 P.3d 780, 784 (Ct. App. 2004). The two carnival workers communicated with Kelly personally in a face-to-face encounter. Although it is not obvious why they reported the alleged incident to Kelly instead of contacting the police directly themselves, they asked him to report the incident to the police for them, directly engaging Kelly as a city official. They openly identified themselves as employees of the carnival, subjecting themselves to criminal sanctions if their report was discovered to be false.<sup>2</sup> There is no indication that they tried to conceal their identities or remain anonymous in any way; instead their identities were readily ascertainable. *Compare Larson*, 135 Idaho at 100, 15 P.3d at 335 (declaring that woman who called dispatch

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<sup>2</sup> These two men also identified Bishop as the man who attempted to sell them methamphetamine after he was taken into police custody.

and gave police her home address where incident was occurring was not anonymous because her identity could be easily discovered and she was not trying to avoid identification), *with White*, 496 U.S. at 327 (using anonymous tips from unidentified caller that were substantially corroborated by officers), *Gates*, 462 U.S. at 225-26 (investigating anonymous tips contained in unsigned handwritten letter received by the police), *Alexander*, 138 Idaho at 23, 56 P.3d at 785 (upholding warrant issued in part on anonymous tip by a concerned caller who expressed a desire to remain anonymous), and *State v. Deccio*, 136 Idaho 442, 443-44, 34 P.3d 1125, 1126-27 (Ct. App. 2001) (finding caller's refusal to identify herself or her location rendered her anonymous despite claiming to be the best friend of the defendant's wife).

Kelly reported his contact with the two carnival workers to Chief Miller and informed him of the nature of the conversation and basic identities of the individuals. Having established the carnival workers as known citizen informants, their reliability and veracity are likewise established. Reliability of information alone does not give rise to reasonable suspicion however; the basis of knowledge and content of the information provided also must be sufficient to justify Chief Miller's investigative detention of Bishop. The two carnival workers informed Kelly that a man had attempted to sell them drugs. They had first-hand knowledge of facts which indicated that Bishop was involved in criminal conduct. Personal observation by an informant is one of the strongest possible indications of a basis of knowledge. *Alexander*, 138 Idaho at 23, 56 P.3d at 785. Kelly described Bishop to Chief Miller with details about his appearance, the fact that he wore glasses, the color of his clothing, the length of his hair, and that he was wearing a baseball cap. According to Chief Miller, the carnival workers and Kelly described Bishop "to a 'T.'" Furthermore, the time lag between when Bishop offered to sell methamphetamine to the carnival workers and when Chief Miller approached him in the alley outside a market was relatively short, it was just minutes.

The reliability of the information, together with the specific degree to which Bishop was identified, created a reasonable suspicion that Bishop was, had been, or would be engaged in criminal activity, justifying a *Terry* stop for further investigation. *See, e.g., Rawlings*, 121 Idaho at 932-33, 829 P.2d at 522-23 (holding that the totality of the circumstances justified stopping the defendant since he was the only person in the area early in the morning following the report of a burglary in a business neighborhood and defendant was walking in the direction of a motel into which he could easily disappear); *Van Dorne*, 139 Idaho at 964-65, 88 P.3d at 783-84

(concluding the officer had reasonable suspicion to stop the defendant based on a citizen's report that the defendant was intoxicated, had been involved in a car accident with the citizen, and the citizen provided defendant's license plate number); *Holler*, 136 Idaho at 291, 32 P.3d at 683 (finding objective basis to stop defendant based on citizen's report that man matching his description was going through lawns at 3:45 in the morning and whom officers had previously encountered in a more suitable state of dress looking for his dog). *But see Zapata-Reyes*, Docket No. 32908 (determining there was no reasonable and articulable suspicion to stop the defendant since the known tipster did not provide enough details as to the type of car driven past his house or how much time had passed, and officers' observations contributed nothing to the belief that defendant was engaged in criminal activity); *Deccio*, 136 Idaho at 445-46, 34 P.3d at 1128-29 (affirming decision that officer lacked reasonable suspicion to stop defendant's car because the anonymous tipster provided no basis for her suspicions and her inaccurate predictions could not be corroborated by the officer).

**B. Evidence Discovered as a Result of an Unlawful Frisk Must Be Suppressed**

Bishop's second argument on appeal is that Chief Miller lacked facts to support the belief that he was armed and dangerous and thus had no basis to conduct a protective frisk for weapons. Therefore any evidence seized as a result of the frisk should be suppressed. The state correctly points out that no evidence was discovered during the frisk, and the drugs were only located during the search of Bishop incident to arrest for resisting and obstructing an officer. However, the frisk is inexorably entwined with subsequent events. Thus, we address the validity of the frisk as it relates to the eventual discovery of drugs on Bishop's person. *See State v. Kerley*, 134 Idaho 870, 11 P.3d 489 (Ct. App. 2000). In *Kerley*, officers lawfully detained the defendant during a traffic stop, believing him to be the subject of an outstanding warrant. *Id.* at 872, 11 P.3d at 491. During a frisk for weapons, officers discovered a small glass vial in his pocket, and Kerley consented to its removal. *Id.* at 872, 11 P.3d at 491. Officers later discovered that the warrant was for Kerley's twin brother, and not for him. *Id.* at 872 n.1, 11 P.3d at 491 n.1. On appeal, this Court held that the officers had no basis to believe Kerley was armed and dangerous, and rejected the state's alternative theories that Kerley consented to the frisk or that it was a lawful search incident to arrest. *Id.* at 874-75, 11 P.3d at 493-94. Since the discovery of the vial containing methamphetamine flowed directly from the unlawful frisk, all evidence discovered as a result of the frisk was suppressed. *Id.* at 875, 11 P.3d at 494.

An officer may conduct a limited frisk of an individual's outer clothing to discover weapons that might be used against the officer or others if the officer can point to specific and articulable facts that would lead a reasonably prudent person to believe that the individual with whom the officer is dealing may be armed and presently dangerous and nothing in the initial stages of the encounter serves to dispel this belief. *Terry*, 392 U.S. at 27; *see also Ybarra v. Illinois*, 444 U.S. 85 (1979); *State v. Henage*, 143 Idaho 655, 660-61, 152 P.3d 16, 21-22 (2007); *Babb*, 133 Idaho at 892, 994 P.2d at 635. In our analysis of a frisk, we look to the facts known to the officer on the scene and the inferences of risk of danger reasonably drawn from the totality of those specific circumstances. *Babb*, 133 Idaho at 892, 994 P.2d at 635; *see also State v. Muir*, 116 Idaho 565, 567-68, 777 P.2d 1238, 1240-41 (Ct. App. 1989). The proper inquiry is to determine whether it was objectively reasonable for the officer to conclude a pat-down search was necessary for the protection of the officer or others. *Henage*, 143 Idaho at 660, 152 P.3d at 21. “[D]ue weight must be given, not to [the officer’s] inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Terry*, 392 U.S. at 27.

According to Chief Miller’s testimony, when he approached Bishop in the alley, Bishop was nervous and fidgety, and it was obvious that Bishop “did not want to be with [him].” Chief Miller thought that Bishop could flee at any moment. Bishop kept his hands clutched to his chest with his plastic shopping bag from the market. Chief Miller believed that Bishop was under the influence of a narcotic because of his blood-shot, wild-looking eyes and his odd statement about Jesus. Chief Miller testified at the hearing on Bishop’s motion to suppress that he “wasn’t sure if he -- if he had a weapon or -- You know, his mental state at that point seemed to me that he could -- he could be dangerous.” Chief Miller further stated that he believed a protective frisk was justified based on Bishop’s actions, his body language, and his appearance; specifically that Bishop was fidgety and nervous, and clearly didn’t want to be talking with him. On cross-examination Chief Miller declared that he did fear for his own safety, but provided no further details as to why he believed Bishop was armed or his safety was threatened.

Factors that have previously contributed to the determination of whether an officer possessed reasonable suspicion for a frisk include the time of day of the stop, the location of the stop, the reputation of the person stopped, any previous encounters the officer has had with the person, whether the person is combative with the officer, any suspicious bulges in the person’s



clothing, furtive hand-movements by the person, attempts by the person to conceal his hands, whether the person is intoxicated during the encounter, and the tenor of the conversation. *See, e.g., Henage*, 143 Idaho at 661-62, 152 P.3d at 22-23; *State v. Davenport*, 144 Idaho 99, 156 P.3d 1197 (Ct. App. 2007); *State v. Baxter*, Docket No. 32597 (Ct. App. Apr. 20, 2007); *Kerley*, 134 Idaho at 873, 11 P.3d at 492. Although Chief Miller thought Bishop might be under the influence of methamphetamine at the time of the stop and appeared nervous and fidgety, he was polite to Chief Miller and did not attempt to engage him in any physical manner. The stop took place during daylight hours in a public alley behind a grocery store. The state provided no evidence that Bishop's clothing had unusual bulges that could indicate a weapon, that Bishop's hands were hidden or that Bishop refused to keep his hands in the open, that the grocery bag appeared to contain a weapon, or that Bishop had violent tendencies with law enforcement officers or others. In fact, Chief Miller indicated that he thought Bishop would prefer to run away, but showed no indication that he would fight to escape. While Bishop's behavior contributed to a reasonable suspicion for his detention, grounds to justify a lawful investigatory stop do not automatically justify a frisk for weapons. *Baxter*, Docket No. 32597. As with the officer in *Henage*, 143 Idaho at 662, 152 P.3d at 23, Chief Miller has here failed to connect Bishop's nervousness and odd statements with anything tending to demonstrate a risk to his safety. After considering all of the evidence presented as to Bishop's behavior and considering Chief Miller's training and experience, we find that there were not specific and articulable facts to support a reasonable suspicion that Bishop was both armed and dangerous, necessitating a protective frisk for weapons.

#### IV.

#### CONCLUSION

Chief Miller had reasonable suspicion to stop Bishop for investigatory purposes based on the information provided by the two carnival workers and Kelly. This lawful detention did not give rise to reasonable and articulable facts justifying a protective frisk, and thus the subsequent search was also invalid. The district court's denial of Bishop's motion to suppress is reversed, the judgment of conviction is vacated, and this case is remanded for proceedings consistent with this opinion.

Chief Judge PERRY and Judge Pro Tem WALTERS **CONCUR.**